

PETITION NOT PRINTED IN THE

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JAMES H. BROWN JR. CLERK

**SUPREME COURT  
of the  
UNITED STATES**

**OCTOBER TERM, 1960**

**NO. 44**

**BILLY FERGUSON**

**Appellant**

**v.**

**THE STATE OF GEORGIA**

**Appellee**

**Appeal from the  
Supreme Court of Georgia**

**BRIEF OF THE APPELLEE**

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**ROBERT J. NOLAND**

CITATIONS _____	iii
OPINION BELOW _____	1
QUESTIONS PRESENTED _____	2
STATUTES INVOLVED _____	3
STATEMENT _____	3
SUMMARY OF ARGUMENT _____	5
ARGUMENT _____	6

**I. Upon an appeal to the United States Supreme Court from the highest Court of a State under the provision of Section 1257 (2), Title 28, USC, the only question presented is the constitutionality of the State Statute held valid by the State Court, when there have been no other Federal questions raised before the State Courts \_\_\_\_\_ 6**

**II. Section 38-415 of the Code of Georgia, as interpreted by the Courts of Georgia, authorizing the defendant, in a criminal case, who is incompetent as a witness, to make an unsworn statement, but permitting direct examination only in the discretion of the trial court, does not violate the due process clause of the Fourteenth Amendment to the Federal Constitution, and even if Section 38-415 is invalid, the defendant in this case would not be benefited since he would be unable to make any statement. \_\_\_\_\_ 9**

**III. The admission into evidence of a confession freely and voluntarily given by the**

defendant when he had been fully advised of his rights to make or not make a statement and of his right to counsel, does not violate the Fourteenth Amendment to the Federal Constitution, even though the defendant was later held for a period of time exceeding that authorized by Georgia Law for taking the accused before a committing officer. \_\_\_\_\_ 15

IV. The action of the Supreme Court of Georgia in requesting an approved brief of evidence as required by Georgia Law before disturbing determinations of fact made by the trial court is not violative of any rights guaranteed to the defendant under the Federal Constitution. \_\_\_\_\_ 17

V. There is no showing in the record that any of the jurors were disqualified to serve as such, and hence there is no merit in the defendant's contentions in this regard. \_\_\_\_\_ 20

CONCLUSION \_\_\_\_\_ 21

## CITATIONS

## Cases:

- Bothwell v. Buckbee, Mears Company**  
272 U.S. 274, 72 L.Ed. 277 (1927)\_\_\_\_\_ 9
- Bullock v. U.S.**  
265 F 2d 683 (C.A. 6th Cir. 1959) Cert.  
den., 360 U.S. 909, 3 L.Ed. 2d 1260\_\_\_\_\_ 14
- Bute v. Illinois**, 329 U.S. 173,  
91 L.Ed. 172 (1946)\_\_\_\_\_ 13
- Central Vt. Ry. Co. v. White, Admx**  
238 U.S. 507, 59 L.Ed. 1433 (1915)\_\_\_\_\_ 9
- Chambers v. Florida**  
309 U.S. 227, 84 L.Ed. 716 (1940)\_\_\_\_\_ 16
- Corbin v. State**  
212 Ga. 231 (7), 91 S.E. 2d 764 (1956) Cert  
den. 351 U.S. 987, 100 L.Ed. 150\_\_\_\_\_ 10, 15
- Crooker v. California**  
357 U.S. 433, 2 L.Ed. 2d 1448, reh. den. 358  
U.S. 858, 3 L.Ed 2d 92 (1958)\_\_\_\_\_ 16, 17
- Dewey v Des Moines**  
173 U.S. 193, 43 L.Ed. 36  
(1899) \_\_\_\_\_ 8, 9, 15, 21
- Doe ex dem Patterson v. Winn**  
5 Pet 233, 8 L.Ed. 108 (1831)\_\_\_\_\_ 11
- Enterprise Irrigation District v.  
Farmers Mutual Canal Co.**  
243 U.S. 157, 61 L.Ed. 644 (1917)\_\_\_\_\_ 20
- Fikes v. Alabama**  
352 U. S. 191, 1 L.Ed. 2d 246 (1957)\_\_\_\_\_ 16
- Giles v. Peachtree Pantries, Inc., et al.**  
209 Ga. 536, 74 S.E. 2d 549 (1952)\_\_\_\_\_ 18
- Guaranty Trust Co. of N. Y. v. Blodgett**  
287 U.S. 509, 77 L.Ed. 463 (1932)\_\_\_\_\_ 11

<b>Holley v. Lawrence</b> , 317 U. S. 518, 87 L.Ed. 434 (1943)	15
<b>Leland v. Oregon</b> 343 U.S. 790, 96 L.Ed. 1302 (1952)	14
<b>Mallory v. U.S.</b> 354 U.S. 499, 1 L.Ed. 2d 1479 (1957)	15
<b>Manhattan Life Insurance Co. v. Cohen</b> 234 U. S. 123, 58 L. Ed. 1245 (1945)	9
<b>McCrary v. State</b> 215 Ga. 887, S.E. 2d (1960)	19
<b>McNabb v. U. S.</b> 318 U.S. 332, 87 L.Ed. 819 (1942)	16
<b>NAACP v. Alabama</b> 357 U.S. 449, 2 L.Ed. 2d 1488 (1958)	20
<b>Nail v. Nail, Exec.</b> 212 Ga. 299, 92 S.E. 2d 109 (1956)	18
<b>Northwestern Bell Tel. Co. v. Nebraska State Railway Comm.</b> , 297 U.S. 471, 80 L. Ed. 810 (1936)	9
<b>Powell v. Alabama</b> 287 U.S. 45, 77 L.Ed. 159 (1932)	13
<b>Stein v. New York</b> 346 U.S. 156, 97 L.Ed. 1522 (1953)	16
<b>Watts v. Indiana</b> 338 U.S. 49, 92 L. Ed 1801 (1949)	16
<b>Whitney v. California</b> 274 U.S. 357, 71 L.Ed. 1095 (1926)	9
<b>Williams v. Kaiser</b> 323 U.S. 471, 89 L. Ed. 391 (1944)	10, 20

## Constitutional and Statutory Provisions:

United States Constitution, 14th  
Amendment \_\_\_\_\_ 5, 8, 11, 12, 14

United States Code, Section 1257 (2) \_\_\_\_\_ 1, 6

Georgia Constitution, Article 1, Section 1,  
Paragraph III \_\_\_\_\_ 8

### Georgia Code Annotated

Section 2-103 \_\_\_\_\_ 8

Section 6-801 \_\_\_\_\_ 18

Section 6-803 \_\_\_\_\_ 18

Section 27-212 \_\_\_\_\_ 17

Section 38-415 \_\_\_\_\_ 2, 5, 6, 7, 8, 9, 10, 11, 12, 14

Section 38-416 \_\_\_\_\_ 11

Section 59-719 \_\_\_\_\_ 20

### Georgia Laws

Cobb's Digest, page 721 \_\_\_\_\_ 11

Georgia Laws, 1866, p. 138 \_\_\_\_\_ 12

Georgia Laws, 1868, p. 24 \_\_\_\_\_ 12

Georgia Laws, 1874, p. 22 \_\_\_\_\_ 12

Georgia Laws, 1878-79, p. 23 \_\_\_\_\_ 12

Prince's Digest, page 570 \_\_\_\_\_ 11

### Miscellaneous:

Section 13-12 \_\_\_\_\_ 18

### Georgia Practice and Procedure,

Wigmore on Evidence, 3rd Ed.,

Section 579 \_\_\_\_\_ 11, 13

IN THE  
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Appellee

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Appeal from the  
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**BRIEF OF THE APPELLEE**

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**OPINION BELOW**

The opinion of the Supreme Court of Georgia (R. 73-78) affirming the conviction of appellant for murder is reported as **Ferguson v State** 215 Ga. 117, 109 S.E. 2d 44, decided May 8, 1959, rehearing denied June 5, 1959.

**QUESTIONS PRESENTED**

1. Upon an appeal to the United States Supreme Court from the decision of a State court under the provisions of Section 1257(2), United States Code, in which the validity of a State statute has been sustained by the State Su-

preme Court against an attack alleging that it is repugnant to the Constitution of the United States, will this Court restrict its review to the constitutional validity of the State statute involved, or will it review the case in its entirety, even though no additional federal issues were raised before and passed upon by the State courts?

2. Does Section 38-415 of the Code of Georgia, as interpreted by the State court authorizing the defendant in a criminal case to make an unsworn statement but not permitting him to submit himself to direct examination except in the discretion of the trial court, violate the due process clause of the 14th Amendment to the Federal Constitution by depriving the defendant of his right to counsel?

3. Assuming, but not conceding, that this Court will review all issues in this case, even though not presented to and passed upon by a State court as federal issues, the following additional questions would be presented:

a. Does the admission into evidence by a State court of a confession freely and voluntarily given by a criminal defendant under no coercion or threat or promise of reward, when the accused has been fully advised of his rights, including the right to counsel, violate any Federal constitutional rights of the accused, even though at the time that the confession was made, the accused was being held without having had a preliminary hearing, when the confession was made less than eight hour after the arrest?

b. Was there any denial of Federal due process in the Supreme Court of Georgia adhering to its established procedure and refusing to pass upon alleged errors involving questions of evidence when there was no certified brief of evidence?

### **STATUTES INVOLVED**

#### **Section 38-415, Georgia Code.**

In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

#### **Section 38-416, Georgia Code.**

No person, who shall be charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction, shall be competent or compellable to give evidence for or against himself.

### **STATEMENT**

In this case, the defendant, Billy Ferguson, was indicted in Douglas County on September 15, 1958, for the murder of Luke A. Brown on July 17, 1958 (R. 4). He plead not guilty, (R. 5) and was tried September 23 through September 24, 1958, and found guilty (R. 5, 6). He was sentenced to death by electrocution (R. 70). The

defendant's motion for new trial (R. 6) as amended (R. 7), was overruled on February 3, 1959 (R. 15 and 16). The Supreme Court of Georgia affirmed the conviction on May 8, 1959 (R. 73-77) and denied a motion for rehearing June 5, 1959 (R. 82). The defendant filed his Notice of Appeal to the Supreme Court of the United States on August 29, 1959 (R. 82-84). This Court noted probable jurisdiction and transferred the case to the appellate docket on February 29, 1960 (R. 85)

The evidence introduced at the trial of the case showed that Luke A. Brown was killed near the city of Douglasville, Georgia, on July 17, 1958, around 7 A.M. (R. 17). The defendant had been seen in the vicinity around the time of the crime (R. 17), and was stopped by two police officers on a highway leading to Douglasville around 10 A.M. and was taken to the county jail (R. 25). He talked to some officers but made no confession (R. 25, 35, 41). He was not confined in a cell but was placed in the run-around on the ground floor of the jail (R. 28). The defendant was permitted to call his fiancée from the jail around Noon (R. 56). About 4 P.M., the defendant, having been fully advised of his right to remain silent and his right to counsel, freely and voluntarily confessed that he had committed the murder of Mr. Brown (R. 25, 37, 38, 62, 63). The defendant stated that he had murdered Mr. Brown because "If I had let him live he could have told who I was" (R. 37). The defendant's confession was then reduced to writing, and signed by him, and introduced into evidence (R. 68-69). After this occurred, the same afternoon, the defendant in

talking to his fiancée admitted that he had killed Mr. Brown (R. 56, 58, 59, 60).

## **SUMMARY OF ARGUMENT**

The sole question presented by this appeal is the validity of Georgia Code Section 38-415 under the 14th Amendment to the Federal Constitution as being a denial of the right to counsel. This section authorizing the defendant in a criminal proceeding to make an unsworn statement but not permitting direct examination except in the discretion of the trial court, when construed with other provisions of Georgia law providing that the defendant in a criminal case is an incompetent witness, simply extend to the defendant a privilege unknown to common law and it is not a denial of the right to counsel to require counsel to conform to reasonable procedural requirements in the exercise of this privilege.

Although the constitutionality of Code Section 38-415 was the only issue presented to the State courts as involving a Federal question, in the event that this Court desires to review the other issues sought to be raised, it is respectfully submitted that the record clearly shows that the confession given by the defendant was freely and voluntarily given, and hence clearly admissible into evidence in a State court, if not a Federal court. The other alleged errors simply involve dissatisfaction with State procedural requirements, and present no aspects of the denial of a Federal right.

## ARGUMENT

1. Upon an appeal to the United States Supreme Court from the Highest Court of a State under the provision of Section 1257 (2), Title 28, USC, the only question presented is the Constitutionality of the State Statute held valid by the State Court, when there have been no other Federal Questions raised before the State Courts.

This case is an appeal from the Supreme Court of Georgia, under the provisions of Section 1257 (2) of Title 28, U.S.C. The defendant in the trial court (R. 8,9) and before the appellate tribunal. contended that Section 38-415 of the Code of Georgia, was a violation of the Fourteenth Amendment to the Constitution of the United States in that it denied him due process by depriving him of his right to counsel. The Supreme Court of Georgia ruled adversely to the defendant's contentions, and upheld the constitutionality of the State statute involved (R.75). This Court was thus given jurisdiction by way of appeal, and it is respectfully submitted that the sole question presented to this Court is whether Section 38-415 violates the due process clause of the Fourteenth Amendment to the Federal Constitution since none of the other issues sought to be raised by the appellant in his jurisdiction statement and brief filed in this Court, were presented to the State courts of Georgia as involving Federal questions or the denial of Federal rights.

In order to determine whether there were any Federal questions properly presented to

the State Courts, it is necessary to closely examine the record of this case. Defendant's amendment to his motion for a new trial (R.7-12) contains five special grounds.

Ground One (R.7) is not in any way involved in this appeal. Ground Two (R. 7) concerns the constitutionality of Georgia Code Section 38-415, which appellee contends is the only issue before this Court. Ground Three (R. 9-11) alleged error in the admission into evidence of a confession made by the defendant, on the grounds that the defendant was being held illegally and therefore making the confession "void". There is no allegation that the admission of this confession into evidence violated the defendant's rights under the Federal Constitution. Grounds Four and Five (R. 11-12) allege error on the grounds that members of the jury were related to the Solicitor General and also that certain jury members were biased and prejudiced. Here again the defendant failed to base the alleged error upon the grounds of deprivation of Federal constitutional rights. An examination of the defendant's bill of exceptions (R. 1-3), his motion for rehearing (R. 79-81), and the opinion of the Supreme Court of Georgia (R. 73-78), show that the only mention of Federal constitutional rights is in connection with the discussion of the validity of Georgia Code Section 38-415 (R.75).

Even in his Notice of Appeal to this Court (R. 82-84), defendant refers to only one ground as denying a Federal constitutional right, (R. 83) the other questions which are presented according to the Notice of Appeal are alleged to

be violations of "due process", but it should be noted that Article I, Section I, Paragraph III of the Constitution of Georgia (Ga. Code Anno. Section 2-103) contains a due process clause, as explicit as the mandate of the Fourteenth Amendment to the United States Constitution.

The first time that the defendant mentions anything denying Federal constitutional rights other than the alleged unconstitutionality of Georgia Code Section 38-415, is in his jurisdictional statement filed in this Court, where he, under the heading of "Questions Presented" attempted to present as one question involving Federal constitutional issues, the whole of the trial and appellate court proceedings in his case.

It is respectfully submitted that under these circumstances, the only question presented for determination by this Court, is the validity of Georgia Code Section 38-415 under the Fourteenth Amendment to the United States Constitution. "It is not enough that there be somewhere hidden in the record, a question which, if raised, could be of a Federal nature. (Citation omitted.) In order to be available in this Court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States." **Dewey v. Des Moines**, 173 U.S. 193, 199-200, 43 L. Ed. 665, 667 (1899). It is necessary in order to obtain from United States Supreme Court an adjudication as to the denial of a right under the Federal Constitution, that a claim of such

denial be presented to the lower Court. "A claim which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. (Citation omitted). A point that was never raised cannot be said to have been decided adversely to one who never set it up or in any way alluded to it . . ." **Dewey v. Des Moines**, 173 U.S. 193, 199-200, 43 L. Ed. 665, 667 (1899); see also **Cent. Vt. Ry. Co. v. White Admx.**, 238 U.S. 507, 59 L. Ed. 1433 (1915) **Bothwell v. Buckbee, Mears Co.**, 275 U.S. 274, 72 L. Ed. 277 (1927); **Northwestern Bell Tel. Co. v. Neb. State Railway Comm.**, 297 U.S. 471, 80 L. Ed. 810 (1936). See also **Manhattan Life Insurance Company v. Cohen**, 234 U.S. 123, 58 L. Ed. 1245 (1945); **Whitney v. California**, 274 U.S. 357, 362, 71 L. Ed. 1095, 1100 (1926).

**II. Section 38-415 of the Code of Georgia, as interpreted by the Courts of Georgia, authorizing the defendant in a criminal case, who is incompetent as a witness, to make an unsworn statement, but permitting direct examination only in the discretion of the Trial Court does not violate the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, and even if Section 38-415 is invalid, the defendant in this case would not be benefited since he would be unable to make any statement.**

Section 38-415 of the Code of Georgia reads as follows:

In all criminal trials, the prisoner shall have the right to make to the court and jury such

statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

The Courts of Georgia have interpreted this Code Section to mean that "counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury". (Emphasis supplied). (R. 75) See also *Corbin v. State*, 212 Ga. 231 (7), 91 S.E. 2d 764 (1956), Cert. den. 351 U.S. 987, 100 L. Ed. 150. This statement by the Georgia Courts is an authoritative determination as to the meaning of Code Section 38-415 and as such is binding on the United States Supreme Court as to the meaning of the statute. *Williams v. Kaiser*, 323 U.S. 471, 89 L.Ed. 391 (1944). Counsel for the defendant on page 7 of his brief attacks the interpretation given to Code Section 38-415 by the Georgia Court stating that it "flies in the face of common sense" and is illogical, and contrary to legislative intent. It is respectfully submitted that this argument is not open to the defendant in the present proceeding. As was stated by Mr. Justice Sutherland, "We are not at liberty to disregard the explicit holding of the State Court as to the basis of its decision, except for convincing reasons which here we are unable to find. We are bound by the decisions of that court as though the meaning as

fixed by the Court has been expressed in the statute itself in specific words. (Citation omitted). **Guaranty Trust Company of N.Y. v. Blodgett**, 287 U.S. 509, 77 L. Ed. 463 (1932).

Of course, the interpretation given Code Section 38-415 by the Georgia Courts is binding upon this Court only as to the meaning of the statute involved and does not foreclose review by this Court as to the validity of the law under the due process clause of the Fourteenth Amendment to the United States Constitution, but it is respectfully submitted that this latter is the only question submitted to this Court for determination by this appeal.

In order to determine the constitutionality of the involved statute, it is necessary to examine not only the State law itself as previously quoted, and its interpretation by the Georgia Courts, but also other pertinent provisions of Georgia Law. Of particular interest in this regard is Georgia Code Section 38-416 (quoted on the 3rd page of this brief) which provides that no person charged with a criminal offense shall be competent or compellable to give evidence for or against himself. This latter Code Section pre-dates Code Section 38-415 having been part of the common law of England which was adopted by the State of Georgia; see Prince's Digest, p. 570; Cobb's Digest, p. 721; **Wigmore on Evidence**, 3rd Ed. Section 579; see also **Doe ex dem Patterson v. Winn**, 5 Pet 233, 8 L. Ed. 108 (1831). This common law disqualification of criminal defendants as witnesses, first appeared in the statutory law of Georgia in 1866, when the legislature removed common law dis-

qualifications from certain witnesses, but specifically retained the disqualification of criminal defendants. (Ga. Laws, 1866, p. 138)

Two years after placing this common law disqualification of witnesses into the statute law of the State, the General Assembly extended to criminal defendants in felony cases the privilege of making an unsworn statement to the jury. (Ga. Laws, 1868, p. 24). This privilege was later extended to all criminal defendants. (Ga. Laws, 1874, p. 22; Ga. Laws 1878-79, p. 23) These three acts, unchanged except for minor modifications, made by Code revisors, constitute the present Section 38-415 of the Georgia Code, the law which defendant in this case attacks as contravening the Fourteenth Amendment to the United States Constitution. In other words, the defendant is contending that the law of Georgia extending to him a privilege to make an unsworn statement is unconstitutional because he cannot have his counsel ask him questions upon direct examination.

It is respectfully submitted that such does not in any way infringe upon the defendant's rights under the due process clause of the Fourteenth Amendment to the United States Constitution by depriving him of his right to counsel. As was stated by the Supreme Court of Georgia, the right to counsel confers "only the right to have counsel perform those duties and take such actions as are permitted by law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel." (R. 75)

Defendant cites the case of **Powell v. Alabama**, 287 U.S. 45, 77 L. Ed. 159 (1932) for the proposition that the defendant "requires the guiding hand of counsel at every stage in the proceeding against him." However, the **Powell Case** differs vastly upon its facts from the case at bar. In the **Powell Case**, the defendant was not furnished effective assistance of counsel because counsel was unable to prepare for trial. In this case, there is nothing in the record to show that counsel could not (or even did not) advise his client of Georgia procedure and the fact the client would make an unsworn rather than a sworn statement. There was nothing to prevent counsel from questioning his client prior to trial, and advising him as to what points to emphasis in such a statement. And despite counsel's statement to the contrary in his brief, there is nothing in the record to show that the defendant was not of normal intelligence and able to comprehend fully the advice of his counsel. In fact the record shows that he was an average employee of Piedmont Roofing Company (R 33-34). The Georgia Law attacked here is admittedly distinctive and differs from that of every other American jurisdiction; **Wigmore on Evidence**, 3rd Ed. Section 579, but the due process clause of the Federal Constitution does not require a uniform code of procedure in the several states in the administration of criminal law, **Bute v. Illinois**, 333 U.S. 640, 92 L. Ed. 986 (1948); **Fay v. N.Y.**, 332 U.S. 261, 91 L. Ed. 2043 (1947); **Hysler v. Florida**, 315 U.S. 411, 86 L. Ed. 932 (1941). "It is for them (the states) therefore to choose the method and practices by which crime is brought to book, so long as

they observe those ultimate dignities of man which the United States Constitution assure . . ."

**Carter v. Illinois**, 329 U. S. 173, 175; 91 L. Ed. 172, 175 (1946). It is respectfully submitted that the Georgia practice of allowing a criminal defendant who is incompetent to be a witness, to make an unsworn statement without being under direct examination by his counsel, is not violative of these dignities, but rather is extending to defendant a privilege which he did not have at common law. Cf. **Leland v. Oregon**, 343 U.S. 790, 96 L. Ed. 1302 (1952).

The contention made by the defendant in this case is somewhat similar to the contention made in a recent case in the Sixth Circuit, where the Court of Appeals for that Circuit summarily held that the Constitution does not require that an imprisoning authority transfer an inmate serving a lawful sentence to another prison so that he could be nearer to his counsel. **Bullock v. United States**, 265 F. 2d, 683, 695 (C. A. 6th Cir., 1959), Cert. den., 360 U.S. 909, 3 L. Ed. 2d 1260. It is submitted that this case is similar in principle with the case at bar, since in both, the defendant is asking for special privilege in the name of his "right to counsel" and in both the courts have decided that the contention was irrelevant to what actually occurred.

Defendant in his brief filed in this court attempts to raise for the first time the issue of that Code Section 38-415 is also unconstitutional under the Fourteenth Amendment to the Federal Constitution as denying the defendant equal protection of the laws because the section

has been interpreted by the Georgia Courts to mean that the trial court has discretion as to whether or not it will permit direct examination of a criminal defendant by his counsel. Cf. **Corbin v. State**, 212 Ga. 231, 91 S.E. 2d 764 Cert. den., 351 U. 987; 100 L. Ed. 1501 (1956). Not only is it too late to raise the new unrelated issue in this Court, **Dewey v. Des Moines**, 173 U. S. 193, 43 L.Ed. 665 (1899), but also the defendant failed to ask the trial court to exercise its discretion and allow his counsel to question him or point out any omission in his statement, and hence cannot complain because it was not exercised in his favor. **Holley v. Lawrence**, 317 U.S. 518, 87 L.Ed. 434 (1943).

**III. The admission into evidence of a confession freely and voluntarily given by the defendant when he had been fully advised of his rights to make or not make a statement and of his right to counsel, does not violate the Fourteenth Amendment to the Federal Constitution, even though the defendant was later held for a period of time exceeding that authorized by Georgia Law for taking the accused before a committing officer.**

The issue raised by the defendant in regard to the admission into evidence of his confession is more of a factual rather than a legal one. The law in this respect, seems to be well settled. In Federal Courts, as a rule of procedure, when a defendant is being illegally detained, any confession which he may make is inadmissible into evidence regardless of any other circumstances. **Mallory v. U.S.**, 354 U.S. 499, 41 L.Ed.

2d 1479 (1957); **McNabb v. U.S.**, 318 U.S. 332; 87 L.Ed. 819 (1942). However, the mere fact of illegal incarceration does not render a confession made by a defendant in a state criminal prosecution inadmissible into evidence. **Stein v. New York**, 346 U.S. 156, 97 L.Ed. 1522 (1953); **Crocker v. California**, 357 U.S. 433, 2 L.Ed. 2d 1448, reh. den., 358 U.S. 858, 3 L.Ed. 2d 92 (1958) **Fikes v. Alabama**, 352 U. S. 191, 1 L.Ed. 2d 246 (1957). In order that a confession be inadmissible in state court, it is necessary that it be the result of coercion, either physical or mental. **Chambers v. Florida**, 309 U.S. 227, 84 L.Ed. 716 (1940); **Watts v. Indiana**, 338 U.S. 49; 93 L.Ed. 1801 (1949).

In order to determine the presence or absence of coercion in the case at bar it is necessary to carefully examine the record. The defendant was taken into custody at about 10:00 A.M. on July 17, 1958 (R. 25). He was taken to the Douglasville jail, and questioned by several officers around noon (R. 23, 35, 41). He was not placed in a cell (R. 28). He called a friend about 11:45 A.M. (R.56) and requested that she come to the jail. He was again questioned later in the afternoon and made a confession as to the crime. (R. 25, 36, 62)

This statement was made freely and voluntarily and he was not placed in fear of bodily harm or promised any reward (R. 25, 26, 37). He was advised that he had a right to have an attorney and also that he did not have to make a statement (R. 38) and he stated that he did not need an attorney (R. 63). Under these facts, it cannot be said that the defendant's

confession was in any way coerced. "The bare fact of police detention and police examination in private of one in official state custody does not render involuntary a confession by one so detained ... Neither does an admonition by the police to tell the truth ... Nor the failure of the state authorities to comply with local statutes requiring an accused promptly be brought before a magistrate." *Crooker v. California*, 357 U.S. 433, 2 L.Ed. 2d 1448 (1958).

Here the defendant was taken into custody and made a confession within six hours, not under any coercion of any kind. The facts show that he also confessed the killing to his fiancée during a later conversation at the county jail. This certainly shows that was no coercion or improper conduct in the obtaining of the confession.

Georgia Code Section 27-212 cited by counsel is not applicable to this case as there was a warrant issued for the defendant in this case. It should be pointed out that the issue of fact concerning any illegal detention was determined in the habeas corpus proceeding mentioned in the argument of counsel for petitioner and that judgment was not appealed from nor was any of the record of that proceeding included in the record of this trial; nor is it in the transcript of the record before this Court; nor is there any evidence of illegal detention of the prisoner anywhere in the transcript.

**IV. The action of the Supreme Court of Georgia in requesting an approved Brief of Evidence as required by Georgia Law before**

**disturbing determinations of fact made by the Trial Court is not violative of any rights guaranteed to the defendant under the Federal Constitution.**

In order to understand the defendant's contention with reference to the alleged error of the Georgia Supreme Court in failing to acquire the report of the evidence, the affidavits and the countershowing of the State on the motion for new trial mentioned in the Clerk's Certificate (R.72), it is necessary to briefly review the Georgia procedure on appeal. Under Georgia Law, it is the duty of the appealing party to specify what portions of the record and evidence are to be sent up on appeal. (Ga. Code Anno. Sections 6-801; 6-803) However, "evidence, whether in the form of affidavits, documents or otherwise, is not a part of the record and cannot be merely specified and sent up as such, but must either be included in the Bill of exceptions, attached thereto as an exhibit and identified by the trial judge or included in a brief of evidence approved by the trial court and sent up as a part of the record." Ga. Practice and Procedure Section 23-12.

Where a brief of evidence has not been approved by the trial court, the appellate court cannot consider assignments of error relating thereto, even though the clerk of the trial court has sent the unapproved record to the appellate court. **Nail v. Nail, Exec.**, 212 Ga. 299, 92 S. E. 2d 109 (1956). And where documents or other evidence are not approved by the trial judge, the appellate court cannot consider any

allegations of error relating to such evidence and will assume that the judgment in connection therewith is correct and affirm it. **Giles v. Peachtree Pantries, Inc. et al.**, 209 Ga. 536, 74 S.E. 2d 545 (1952).

In his bill of exception in the case at bar, the defendant specifies as a necessary part of the record "The motion for new trial with amendment thereto and all entries and orders thereon, with order overruling said motion as amended, dated February 3rd, 1959" (R. 2). The defendant by this specification does not even request any portion of the evidence adduced at the hearing on the motion for a new trial. Defendant in his motion for rehearing requests that copies of "such record as appear to be necessary in order to fully and fairly adjudicate the questions at issue and alleged errors," be transmitted from the trial court (R. 80). However, the documents which defendant argues in his brief in this Court, should have been transmitted, **were not a part of the record** and under Georgia Law could not become a part of the record (R. 78). **McCrory v. State**, 215 Ga. 887, \_\_\_\_ S.E. 2d \_\_\_\_ (1960) cited by the defendant differs vastly from the case at bar, for in the former case, the Supreme Court of Georgia directed the transmission of a traverse of the State to withdraw a plea, a pleading in the case and not evidence as was requested in this case. In any event, in the **McCrory** case, the Supreme Court of Georgia predicated no part of its ruling upon the disputed traverse. See 215 Ga. 881, 892, \_\_\_\_ S.E. 2d \_\_\_\_, \_\_\_\_ (1960).

Under these circumstances, the Supreme Court of Georgia was following its own procedure, and certainly violated no Federal constitutional rights of the defendant. **Enterprise Irrigation District v. Farmers Mutual Canal Co.**, 243 U.S. 157, 61 L.Ed. 644 (1917) Cf. **NAACP v. Alabama**, 357 U.S. 449, 2 L.Ed. 2d 1488 (1958).

**V. There is no showing in the record that any of the Jurors were disqualified to serve as such, and hence there is no merit in the defendant's contentions in this regard.**

The defendant further contends that there was a violation of his Federal constitutional rights because certain jurors were related to the Solicitor General, and also certain jurors were prejudiced and biased. The contention with regard to the relationship to the Solicitor General can be disposed of summarily, since it is based upon an interpretation of Georgia Code Section 59-716, and the Georgia Courts have decided this contention adversely to the defendant (R 76), a determination of State law which is binding upon this court. **Williams v. Kaiser**, 323 U.S. 471, 89 L.Ed. 391 (1944).

With regard to the alleged bias and prejudice on the part of certain jurors, the only evidence that appears in the record in this regard is in the affidavit of the defense counsel, where prejudice is alleged based on fourth-hand hearsay (R. 13). This would seem to amply justify the Supreme Court of Georgia in accepting the order of the trial judge that there was no evidence of bias or prejudice (R. 15-16). And since the Supreme Court of Georgia, did not pass

upon this issue (see R. 76, 77), the defendant cannot be said to have been denied a right by the decision of that court. **Dewey v. Des Moines**, 173 U.S. 193, 43 L.Ed. 665 (1899).

### CONCLUSION

An examination of the complete record in this case shows that the defendant herein committed a brutal and wanton murder—a crime to which he confessed freely and voluntarily, not only to police officers but to his own fiancée. He was given the full protection guaranteed him by the laws and Constitution of both Georgia and the United States, and has been duly convicted and now must pay the penalty for his crime. For the reasons stated above, it is respectfully submitted the judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 44.—OCTOBER TERM, 1960.

Billy Ferguson, Appellant, v. Georgia.	On Appeal From the Su- preme Court of the State of Georgia.
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[March 27, 1961.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The State of Georgia is the only State—indeed, apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial. Georgia in 1866 abolished by statute the common-law rules of incompetency for most other persons. However, the statute, now Georgia Code § 38-416, expressly retained the incompetency rule as to persons “charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction . . . .” Two years later, in 1868, Georgia allowed the criminal defendant to make an unsworn statement. The statute enacted for that purpose, as amended, is now Georgia Code § 38-415, and provides: “In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.”

In this case a jury in the Superior Court, Douglas County, Georgia, convicted the appellant of murder, and

he is under sentence of death. After the State rested its case at the trial, the appellant's counsel called him to the stand, but the trial judge sustained the State's objection to counsel's attempt to question him. To the argument that to deny counsel the "right to ask the defendant any questions on the stand . . . violates . . . [Amendment] VI . . . [and] . . . the Fourteenth Amendment to the Constitution of the United States . . . [because] it deprives the defendant of the benefit of his counsel asking him questions at the most important period of the trial: . . .," the trial judge answered that under § 38-415, ". . . you do not have the right to do anything more than instruct your client as to his rights, and . . . you have no right to question him on direct examination." In affirming the conviction and sustaining this ruling, the Supreme Court of Georgia said:

"The constitutional provisions granting to persons charged with crime the benefit and assistance of counsel confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel. It has been repeatedly held by this court that counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury." 215 Ga. 117, 119.

On appeal brought here under 28 U. S. C. § 1257 (2), we noted probable jurisdiction. 362 U. S. 901.

The only question which the appellant properly brings before us is whether this application by the Georgia courts of § 38-415 denied the appellant "the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U. S. 45, 69, within the require-

ments of due process in that regard as imposed upon the States by the Fourteenth Amendment. See also *Chandler v. Fretag*, 348 U. S. 3.

Appellant raises no question as to the constitutional validity of § 38-416, the incompetency statute.<sup>1</sup> However, decision of the question which is raised under § 38-415 necessarily involves consideration of both statutes. Historically these provisions have been intertwined. For § 38-416 is a statutory declaration of the common-law rule disqualifying criminal defendants from testifying, and § 38-415, also with its roots in the common law, was an attempt to mitigate the rigors of that incompetency.

The disqualification of parties as witnesses characterized the common law for centuries. Wigmore traces its remote origins to the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law. See 2 Wigmore, *Evidence*, pp. 674-683. Under those old forms, the oath itself was a means of decision. See Thayer, *Preliminary Treatise on Evidence*, pp. 24-34. Jury trial replaced decision by oath with decision of the jurors based on the evidence of witnesses; with this change "[T]he party was naturally deemed incapable of being

<sup>1</sup> It is suggested in the concurring opinions that we should nevertheless adjudicate the validity of § 38-416. Apart from the incongruity of passing upon the statute the appellant expressly refrained from attacking, and disregarding his challenge to the statute he did call in question, such a course would be disrespectful of the state's procedures. For it appears that the Georgia Supreme Court would not have entertained an attack on § 38-416, since the appellant did not offer himself to be sworn as a witness. See *Holley v. Lawrence*, 194 Ga. 529; appeal here was dismissed on the express ground that "the judgment of the court below rests upon a non-federal ground adequate to support it, namely, that the failure to tender such testimony at the trial barred any later claim of the alleged constitutional right . . ." 317 U. S. 518.

such a witness." 2 Wigmore, p. 682. Incompetency of the parties in civil cases seems to have been established by the end of the sixteenth century. See 9 Holdsworth, History of English Law, p. 194. In time the principal rationale of the rule became the possible untrustworthiness of the party's testimony; for the same reason disqualification was applied in the seventeenth century to interested nonparty witnesses.<sup>2</sup>

Its firm establishment for criminal defendants seems to have come somewhat later. In the sixteenth century it was necessary for an accused to conduct his own defense, since he was neither allowed to call witnesses in his behalf nor permitted the assistance of counsel. 1 Stephen, History of the Criminal Law of England, p. 350. The criminal trial of this period has been described as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with utmost eagerness and closeness of reasoning." Stephen, *supra*, p. 326. In the process the defendant could offer by way of explanation material that would later be characterized as testimony. 2 Wigmore, p. 684. In the seventeenth century, however, he was allowed to call witnesses in his behalf; the right to have them sworn was accorded by statute for treason in 1695 and for all felony in 1701. 7 Will. III, c. 3; 1 Anne, St. 2, c. 9. See Thayer, *supra*, pp. 157-161, and n. 4; 2 Wigmore, pp. 685-686. A distinction was drawn be-

Wigmore concludes that "the principle of parties' disqualification would have been the direct root of the disqualification by interest in general." 2 Wigmore, p. 680. "[A]fter Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general." Pp. 682-683. Coke listed a number of disqualifications: if the witness becometh infamous, . . . Or if the witsnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like." Coke on Littleton, 6a.

tween the accused and his witnesses—they gave evidence but he did not. See 2 Wigmore, pp. 684-685, and n. 42; 9 Holdsworth, *supra*, pp. 195-196. The general acceptance of the interest rationale as a basis for disqualification reinforced this distinction, since the criminal defendant was, of course, *par excellence* an interested witness. "The old common law shuddered at the idea of any person testifying who had the least interest." *State v. Barrows*, 76 Me. 401, 400. See *Benson v. United States*, 146 U. S. 325, 336-337.

Disqualification for interest was thus extensive in the common law when this Nation was formed. 3 Bl. Comm. 369.<sup>3</sup> Here, as in England, criminal defendants were deemed incompetent as witnesses. In *Rex v. Lukens*, 1 Dall. 5, 6, decided in 1762, a Pennsylvania court refused to swear a defendant as a witness, holding that the issue there in question "must be proved by indifferent witnesses." Georgia by statute adopted the common law of England in 1784, and "... the rules of evidence belonging to it ... [were] ... in force there ... ." *Doe v. Winn*, 5 Pet. 233, 241. Georgia therefore followed the incompetency rule for criminal defendants long before it was given statutory form by the Act of 1866. See *Jones v. State*, 1 Ga. 610; *Roberts v. State*, 189 Ga. 36, 40-41.<sup>4</sup>

There Blackstone stated the then-settled common-law rule to be that "[a]ll witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause."

<sup>3</sup> By the Act of February 25, 1784, the Georgia Legislature provided that the common laws of England should remain in force in Georgia, "so far as they are not contrary to the constitution, laws, and form of government now established in this State." Prince's Digest (1837), p. 570. Section 3772 of the Code of 1863, which codified the statutory and decisional law of the State, stated: "Witnesses are incompetent ... Who are interested in the event of the suit."

Broadside assaults upon the entire structure of disqualifications, particularly the disqualification for interest, were launched early in the nineteenth century in both England and America. Bentham led the movement for reform in England, contending always for rules that would not exclude but would let in the truth. See *Rationale of Judicial Evidence*, bk. IX, pt. III, c. 3 (Bowring ed.), pp. 393-406. The basic ground of the attack was, as Macaulay said, that "[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals." Lord Macaulay's *Legislative Minutes*, 1835, pp. 127-128. The qualification in civil cases of nonparty witnesses despite interest came first. See Lord Denman's Act of 1843, 6 & 7 Vict., c. 85. The first general exception in England for party witnesses in civil cases was the County Courts Act of 1846, 9 & 10 Vict., c. 95, although there had been earlier grants of capacity in certain other courts. Best, *Evidence* (Lely ed. 1893), pp. 158-159. Lord Brougham's Act of 1851, 14 & 15 Vict., c. 99, virtually abolished the incompetency of parties in civil cases.<sup>3</sup>

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<sup>3</sup> The history of the transition in one American jurisdiction is traced in Thayer, *A Chapter of Legal History in Massachusetts*, 9 Harv. L. Rev. 1. The first American statute removing the disability of interested nonparty witnesses seems to have been Michigan's in 1846, and Connecticut was first to abolish the general incapacity of parties, in 1849. The Field reforms in New York State were influential in leading other American jurisdictions to discard the incapacity of both witnesses and parties in civil cases. For an account of the development in the United States, see 2 Wigmore, pp. 686-695.

The preamble to the 1866 Georgia legislation expressed the legislative aim in extending competency: "Whereas, the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in civil and criminal cases, should be laid before the persons

The qualification of criminal defendants to give sworn evidence if they wished came last. The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. Maine Acts 1859, c. 104. This was followed in Maine in 1864 by the enactment of a general competency statute for criminal defendants, the first such statute in the English-speaking world. The reform was largely the work of John Appleton of the Supreme Court of Maine, an American disciple of Bentham. Within 20 years most of the States now comprising the Union had followed Maine's lead. A federal statute to the same effect was adopted in 1878, 20 Stat. 30, 18 U. S. C. § 3481. Before the end of

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who are to decide upon them, and that such persons should exercise their judgment on the *credit* of the witnesses adduced for the truth of testimony." The first section of the Act forbade the exclusion of witnesses, "by reason of incapacity from crime or interest, or from being a party"; it also contained a "dead man's statute" proviso. The remaining sections enumerated the exceptions to the extension of competency; they were in effect a statutory declaration that certain of the common-law incapacities should remain intact. See *Roberts v. State*, 189 Ga. 36; *Wilson v. State*, 138 Ga. 489, 492; *Howard v. State*, 94 Ga. 587. The second section contained the original of § 38-416, stating: "But nothing herein contained shall render any person, who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable, to give evidence for or against himself, or herself, or shall render any person compellable to answer any question tending to criminate himself or herself; or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband; nor shall any attorney be compellable to give evidence for or against his client." Ga. Laws 1866, pp. 138-139. Save for the provision as to the attorney-client privilege, added during the debate in the Georgia Senate, see Senate Journal, Dec. 5, 1866, p. 266, the second section was verbatim the same as § 3 of Lord Brougham's Act.

the century every State except Georgia had abolished the disqualification.\*

Common-law jurisdictions outside the United States also long ago abolished the disqualification. This change came in England with the enactment in 1898 of the Criminal Evidence Act, 61 & 62 Vict., c. 36. Various States of Australia had enacted competency statutes even before the mother country, as did Canada and New Zealand. Competency was extended to defendants in Northern Ireland in 1923, in the Republic of Ireland in 1924, and in India in 1955.<sup>4</sup>

\* The dates on which the general competency statutes of the States were enacted are: Alabama, 1885; Alaska, 1899; Arizona, 1871; Arkansas, 1885; California, 1866; Colorado, 1872; Connecticut, 1867; Delaware, 1893; Florida, 1895; Hawaii, 1876; Idaho, 1875; Illinois, 1874; Indiana, 1873; Iowa, 1878; Kansas, 1871; Kentucky, 1896; Louisiana, 1886; Maine, 1864; Maryland, 1876; Massachusetts, 1866; Michigan, 1881; Minnesota, 1868; Mississippi, 1882; Missouri, 1877; Montana, 1872; Nebraska, 1873; Nevada, 1867; New Hampshire, 1869; New Jersey, 1871; New Mexico, 1880; New York, 1869; North Carolina, 1881; North Dakota, 1879; Ohio, 1867; Oklahoma, 1890; Oregon, 1880; Pennsylvania, 1885; Rhode Island, 1871; South Carolina, 1866; South Dakota, 1879; Tennessee, 1887; Texas, 1889; Utah, 1878; Vermont, 1866; Virginia, 1886; Washington, 1871; West Virginia, 1881; Wisconsin, 1869; Wyoming, 1877.

The current citations to these statutes are collected in the Appendix to this opinion.

<sup>4</sup> Parliament had enacted a number of specialized competency statutes prior to 1898; the first in 1872. About 25 others had been passed by the time of the enactment of the general competency statute. See 56 Hansard, Parliamentary Debates, 4th Series, pp. 977-978. The most important was the Criminal Law Amendment Act of 1885, which made defendants competent in certain felony prosecutions. Most of the other statutes involved offenses created by regulatory legislation, which were generally misdemeanors. See generally Best, *supra*, pp. 571-572; 2 Taylor, Evidence (12th ed.), 862-863.

\* Canada and New Zealand adopted competency statutes in 1893. Canada Evidence Act, see Rev. Stat. Can. (1952), c. 307, § 4 (1). New Zealand Criminal Code Act, § 398, see N. Z. Repr. Stat., Evi-

The lag in the grant of competency to the criminally accused was attributable in large measure to opposition from those who believed that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence. "[I]f we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation. . . . [It would result in] . . . the degradation of our criminal jurisprudence by converting it into an inquisitory system, from which we have thus far been happily delivered." *People v. Thomas*, 9 Mich. 314, 320-321 (concurring opinion). See also *Ruloff v. People*, 45 N. Y. 213, 221-222; *People v. Tyler*, 36 Cal. 522, 528-530; *State v. Cameron*, 40 Vt. 555, 565-566; 1 Am. L. Rev. 443; Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 Am. L. Rev. 748, 753."

dence Act 1908, § 5. For an account of the Australian development, see 6 Res Judicatae 60. The statute in Northern Ireland is the Criminal Evidence Act (Northern Ireland); the Irish statute is the Criminal Justice (Evidence) Act.

For the Indian statute, see Code of Criminal Procedure (Amendment) Act, 1955, § 61, in 42 A. L. Rep. [1955], Indian Acts Section p. 91.

Opposition on this score was marked in Great Britain. Said one member of Parliament in the 1898 debates: "[W]hy is this change to be made in the law? The English Revolution is against it, three centuries of experience is against it; and the only argument adduced in its favor is the suggestion that an honest man is occasionally convicted of a crime of which he is innocent. . . . it would be a degradation to your great judicial tribunals that, though a guilty man may not, an innocent man may be placed in a position of embarrassment and peril—for the first time under the British Constitution—far greater than any ancient [design].” 56 Hansard, *supra*, pp. 1022, 1023. Said another: “[f]or centuries the criminal

The position of many who supported competency gave credence to these fears. Neither Bentham nor Appleton was a friend of the privilege against self-incrimination.<sup>10</sup> While Appleton justified competency as a necessary protection for the innocent, he also believed that incompetency had served the guilty as a shield and thus disserved the public interest. Competency, he thought, would open the accused to cross-examination and permit an unfavorable inference if he declined to take the stand to exculpate himself.<sup>11</sup>

This controversy left its mark on the laws of many jurisdictions which enacted competency. The majority of the competency statutes of the States forbid comment by the prosecution on the failure of an accused to testify, and provide that no presumption of guilt should arise from his failure to take the stand. The early cases particularly emphasized the importance of such limitations. See, e. g., *Staples v. State*, 89 Tenn. 231; *Price v. Common-*

law of England has been administered on the principle that if you want to hang a man you must hang him on somebody else's evidence. This is a Bill to hang a man on his own evidence . . . ." *Id.*, at 1030. There had been particular opposition on the part of Irish members, who contended that competency would become a means of oppression of defendants there; as a result Ireland was excluded from the coverage of the Act. See 60 Hansard, *supra*, pp. 721-742. Other members were hostile because of fear that the statute would have an adverse effect on laborers who became criminal defendants. See 60 Hansard, *supra*, pp. 546-547, 574-578.

<sup>10</sup> See Bentham, *Rationale of Judicial Evidence*, bk. IX, pt. 4, c. 3, pp. 445-468; Appleton, *The Rules of Evidence*, pp. 126-134.

<sup>11</sup> "That then the accused, if *guilty*, should object to being placed in an attitude so dangerous to him, *because* he is guilty, is what might have been expected . . . His objection to testifying, is an objection to punishment." Appleton, *supra*, p. 134. See also *State v. Cleaves*, 59 Me. 298; *State v. Bartlett*, 55 Me. 200, 215-221. For a note on Appleton's role in the movement to extend competency, see Thayer, *A Chapter of Legal History in Massachusetts*, 9 Harv. L. Rev. 1, 12. See also 14 Am. L. Reg. 705.

*wealth*, 77 Va. 393; *State v. Taylor*, 57 W. Va. 228, 234-235. Cf. 1 Cooley, *Constitutional Limitations* (8th ed.), pp. 658-661. See generally, Reeder, *Comment Upon Failure of Accused to Testify*, 31 Mich. L. Rev. 40. For the treatment of the accused as a witness in Canada, see 12 Can. Bar Rev. 519, 13 Can. Bar Rev. 336; in Australia, see 6 *Rés Judicatae* 60; and in Great Britain, see 2 Taylor, *Evidence* (12th ed.) 864-865; 51 L. Q. Rev. 443; 58 L. Q. Rev. 369.

Experience under the American competency statutes was to change the minds of many who had opposed them. It was seen that the shutting out of his sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath. An American commentator discussing the Massachusetts statute in the first year of its operation said: "We have always been of opinion, that the law permitting criminals to testify would aid in the detection of guilt; we are now disposed to think that it will be equally serviceable for the protection of innocence." 1 Am. L. Rev. 396. See also 14 Am. L. Reg. 129.

This experience made a significant impression in England and helped to persuade Parliament to follow the American States and other common-law jurisdictions in granting competency to criminal defendants. In the debates of 1898, the Lord Chancellor quoted a distinguished English jurist, Russell Gurney: "[A]fter what he had seen there [in America], he could not entertain a doubt about the propriety of allowing accused persons to be heard as witnesses on their own behalf." 54 Hansard, *supra*, p. 1176. Arthur Balfour reported to the Commons that "precisely the same doubts and difficulties which beset the legal profession in this country on the suggestion of this change were felt in the United States, but the result of the experiment, which has been extended grad-

ually from State to State, is that all fears have proved illusory, that the legal profession, divided as they were before the change, have now become unanimous in favor of it, and that no section of the community, not even the prisoners at the bar, desire to see any alteration made in the system." 60 Hansard, *supra*, pp. 679-680.<sup>12</sup>

A particularly striking change of mind was that of the noted authority on the criminal law, Sir James Stephen. Writing in 1863, Stephen opposed the extension of competency to defendants. He argued that it was inherent that a defendant could not be a real witness: "[I]t is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion." A General View of the Criminal Law of England, p. 202. Competency would put a dangerous discretion in the hands of counsel. "By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt, by calling him he might expose an innocent man to a cross-examination which might make him look guilty." *Ibid.* Allowing questions about prior convictions "would indirectly put the man upon his trial for the whole of his past life." *Id.*, p. 203. Twenty years later, Stephen, after many years experience on the criminal bench, was to say: "I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. . . . A poor and ill-advised man . . . is

<sup>12</sup> For other comments on the impact of the competency statutes, see Alverstone, Recollections of Bar and Bench, pp. 176-180; Biron, Without Prejudice; Impressions of Life and Law, p. 218; Train, The Prisoner at the Bar, pp. 205-211; Sherman, Some Recollections of a Long Life, p. 234; 1933 Scots Law Times 29; 2 Fortnightly L. M. H.

always liable to misapprehend the true nature of his defense, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness." 1 Stephen, *History of the Criminal Law of England*, pp. 442, 444.

In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case. The development of the unsworn-statement practice was itself a recognition of the harshness of the incompetency rule. While its origins antedated the nineteenth century,<sup>13</sup> its strong sponsorship by English judges of that century is explained by their desire for a mitigation of the rigors of that rule. Baron Alderson said: "I would *never* prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as a part of the case. If it were otherwise, the most monstrous injustice might result to prisoners." *Reg. v. Dyer*, 1 Cox C. C. 113, 114. See also *Reg. v. Malings*, 8 C. & P. 242; *Reg. v. Walkling*, 8 C. & P.

<sup>13</sup> The origins probably lie in the necessity for the prisoner to defend himself during the early development of English criminal law. See p. 4, *supra*. Even after the defendant was allowed to have witnesses in his behalf in England, he still had no right to be heard by counsel, except for treason, until the act of 1836, and his participation in the trial remained of major importance; as before, "a prisoner was obliged, in the nature of the case, to speak for himself." *Reg. v. Doherty*, 16 Cox C. C. 306, 309. Although the practice developed in the eighteenth century of allowing counsel to advise the accused during the trial and to cross-examine the Crown's witnesses, counsel was still not permitted to address the jury. Stephen, *supra*, p. 424. The defendant continued to do this in his own behalf. See 1 Chitty, *Criminal Law* (5th Am. ed.), p. 623; Bentham, *supra*, bk. IX, pt. 5, c. 3, p. 496. See generally 26 Austral. L. J. 166.

243; *Reg. v. Manzano*, 2 F. & F. 64; *Reg. v. Williams*, 1 Cox C. C. 363. Judge Stephen's sponsorship of the practice was especially influential. See *Reg. v. Doherty*, 16 Cox C. C. 306. See also *Reg. v. Shimmin*, 15 Cox C. C. 122; 60 Hansard, *supra*; p. 657. It became so well established in England that it was expressly preserved in the Criminal Evidence Act of 1898.<sup>14</sup>

The practice apparently was followed in this country at common law in a number of States and received statutory recognition in some: Michigan passed the first such statute in 1861; unlike the Georgia statute of 1868, it provided that the prisoner should be subject to cross-examination on his statement. See *People v. Thomas*, 9 Mich. 314.<sup>15</sup> The Georgia Supreme Court, in one of the early

<sup>14</sup> Criminal Evidence Act, § 1 (h). Some English judges had sought to curtail the practice after defendants were statutorily accorded full benefit of counsel by the act of 1836, 6 & 7 Will. 4, c. 114. In *Reg. v. Boucher*, 8 C. & P. 141, Coleridge, J., held that because defense counsel had addressed the jury, the accused could not make a statement. See also *Reg. v. Beard*, 8 C. & P. 142; *Reg. v. Rider*, 8 C. & P. 539. In *Reg. v. Taylor*, 1 F. & F. 535, Byles, J., said that the prisoner or his counsel would be permitted to address the jury, but not both. At least a remnant of this judicial hostility to the statement lingered almost until the time of the grant of competency. See *Reg. v. Millhouse*, 15 Cox C. C. 622.

In addition to its statutory preservation in Great Britain, it survives in other common-law jurisdictions recognizing the defendant's competency. *E. g.*, New Zealand, see *Rez v. Perry*, [1920] N. Z. L. R. 21; *Kerr v. Reg.*, [1953] N. Z. L. R. 75, 28 N. Z. L. J. 305; Australia, see *Rez v. McKenna*, [1951] Q. S. R. 299; Ireland, see *People v. Riordan*, [1948] I. R. 416, 94 Irish Law Times, Feb. 20, 1960, p. 43, Feb. 27, 1960, p. 49, March 5, 1960, p. 55; South Africa, see *Rez v. de Wet*, [1933] S. A. L. R. 68, 64 So. Afr. L. J. 374.

<sup>15</sup> In some States recognizing the statement at common law, the defendant was confined to arguing the law and commenting on the evidence of the witnesses; he could not state facts. See *Ford v. State*, 34 Ark. 649; *Wilson v. State*, 50 Tenn. 232. In other States, the prisoner appears to have been allowed more latitude. See *People v. Lopez*, 2 Edmonds' Sel. Cases 262 (N. Y.): In Massachusetts, the

decisions considering the unsworn-statement statute, stressed the degree of amelioration expected to be realized from the practice, thereby implicitly acknowledging the disadvantages for the defendant of the incompetency rule. The Court emphasized "the broad and liberal purpose which the legislature intended to accomplish. . . . This right granted to the prisoner is a modern innovation upon the criminal jurisprudence of the common law, advancing to a degree hitherto unknown the right of the prisoner to give his own narrative of the accusation against him to the jurors, who are permitted to believe it in preference to the sworn testimony of the witnesses." *Corwell v. State*, 66 Ga. 309, 316-317.<sup>19</sup>

right of a defendant with counsel to make a statement seems to have been recognized only in capital cases. See the historical review in *Commonwealth v. Stewart*, 255 Mass. 9; see also *Commonwealth v. McConnell*, 162 Mass. 499; *Commonwealth v. Burrough*, 162 Mass. 513; *Commonwealth v. Dascalakis*, 246 Mass. 12, 32. For other considerations of the common-law statement, see *State v. Taylor*, 57 W. Va. 228; *Hanoff v. State*, 37 O. S. 178, 184-185; *O'Loughlin v. People*, 90 Colo. 368, 384-385; *State v. Louviere*, 169 La. 109; cf. *Reg. v. Rogers*, [1888] 1 B. C. L. R. pt. 2, p. 119. Alabama gave the unsworn statement statutory sanction in 1882. Previously the right had been confined there to an argument on the evidence, *State v. McCall*, 4 Ala. 643, but the statute was construed to allow the statement of matters in the nature of evidence. See *Blackburn v. State*, 71 Ala. 319; *Chappell v. State*, 71 Ala. 322. Wyoming gave a statutory right of unsworn statement in 1869. See *Anderson v. State*, 27 Wyo. 345. Florida in 1866 gave the accused in the discretion of the court an opportunity to make a sworn statement on which he could not be cross-examined. This was made an absolute right in 1870. See *Miller v. Florida*, 15 Fla. 577. All these States, of course, subsequently made defendants fully competent.

<sup>19</sup> It is doubtful how far the practice had been followed at common law in Georgia. See *Roberts v. State*, 189 Ga. 36, 41. Initially there seems to have been considerable opposition to giving the unsworn statement statutory sanction. The bill that became the predecessor of present § 38-415 was originally tabled in the House and then passed after reconsideration, and was originally defeated in the

But the unsworn statement was recognized almost everywhere else as simply a stopgap solution for the serious difficulties for the accused created by the incompetency rule. "The system of allowing a prisoner to make a statement had been introduced as a mere makeshift, by way of mitigating the intolerable hardship which occasionally resulted from the prisoner not being able to speak on his own behalf." 60 Hansard, *supra*, p. 651. "The custom grew up in England out of a spirit of fairness to give an accused, who was otherwise disqualified, an opportunity to tell his story in exculpation." *State v. Louviere*, 169 La. 109, 119. The abolition of the incompetency rule was therefore held in many jurisdictions also to abolish the unsworn-statement practice. "In such cases the unsworn statement of an accused becomes secondary to his right of testifying under oath and cannot be received." *State v. Louviere*, *supra*, p. 119. "The privilege was granted to prisoners because they were debarred from giving evidence on oath, and for that reason alone. When the law was changed and the right accorded to them to tell their story on oath as any other witness the reason for making an unsworn statement was removed." *Rex v. Kraschenko*, [1914] 17 D. L. R. 244, 250 (Man. K. B.).<sup>17</sup>

Senate. See House Journal, Aug. 8, 10, 13, 1868, pp. 158, 160, 173; Senate Journal, Oct. 3, 1868, p. 492. As passed, it provided that in cases of felony the prisoner should have the right to make an unsworn statement; he was not subject to cross-examination on it and the jury was empowered to give it such force as they thought right. Ga. Laws 1868, p. 24. In 1874 the right was extended to all criminal defendants. Ga. Laws 1874, pp. 22-23. In 1879 the jury was explicitly empowered to believe the statement in preference to the sworn testimony, Ga. Laws 1878-1879, pp. 53-54, and the statute took its present form.

<sup>17</sup> See also *Clarke v. State*, 78 Ala. 474; *Harria v. State*, 78 Ala. 482; *Hurt v. State*, 38 Fla. 39; *Copeland v. State*, 41 Fla. 320; *O'Loughlin v. People*, 90 Colo. 368.

In Wyoming, the defendant had the option to make an unsworn

Where the practice survives outside America, little value has been attached to it. "If the accused does not elect to call any evidence or to give evidence himself, he very often makes an unsworn statement from the dock. It is well understood among lawyers that such a statement has but little evidential value compared with the sworn testimony upon which the accused can be cross-examined, . . . ." *Rex v. Zware*, [1946] S. A. L. R. 1, 7-8. "How is a jury to understand that it is to take the statement for what it is worth, if it is told that it cannot regard it as evidence (i. e., proof) of the facts alleged?" 68 L. Q. Rev. 463. The unsworn statement "is seldom of much value, since it is generally incoherent and leaves open many doubts which cannot be resolved by cross-examination." 69 L. Q. Rev. 22, 25. "The right of a prisoner to make an unsworn statement from the dock still exists . . . but with greatly discounted value." 1933 Scots Law Times 29. Commentators and judges in jurisdictions with statutory competency have suggested abrogation of the unsworn-statement right. See 94 Irish Law Times, March 5, 1960, p. 56; 68 L. Q. Rev. 463; *Rex v. McKenna*, [1951] Q. S. R. 299, 308.

Georgia judges, on occasion, have similarly disparaged the unsworn statement. "Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief." *Bird v. State*, 50 Ga. 585, 589. "The statement stands upon a peculiar footing. It is often introduced for the mere purpose of explaining

statement even after the grant of competency, since the competency statute expressly preserved the statement. In 1925 the reservation of the right of statement was removed. See *Anderson v. State*, 27 Wyo. 345. Massachusetts thus appears to be the only American jurisdiction still explicitly allowing a defendant in some cases to give either sworn testimony or an unsworn statement. See *Commonwealth v. Stewart*, 255 Mass. 9.

evidence, or as an attempt at mitigation; the accused and his counsel throw it in for what it may happen to be worth and do not rely upon it as a substantive ground for acquittal." *Underwood v. State*, 88 Ga. 47, 51.

The unsworn statement has anomalous characteristics in Georgia practice. It is not treated as evidence or like the testimony of the ordinary sworn witness. "The statement may have the effect of explaining, supporting, weakening or overcoming the evidence, but still it is something different from the evidence, and to confound one with the other, either explicitly or implicitly, would be confusing and often misleading. . . . The jury are to deal with it on the plane of statement and not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it; it is a legal blank.—The jury may stamp it with such value as they think belongs to it." *Vaughn v. State*, 88 Ga. 731, 739. Because the statement is not evidence, even the charge in the strict terms of the statute favored by the Georgia Supreme Court, see *Garrett v. State*, 203 Ga. 756, 765; *Emmett v. State*, 195 Ga. 517, 541, calls attention to the fact that the defendant is not under oath. Moreover, charge after charge going beyond the terms of the statute has been sustained. Thus in *Garrett v. State*, *supra*, the trial judge instructed that while the defendants were "allowed" to make a statement, "they are not under oath, not subject to cross-examination, and you are authorized to give to their statement just such weight and credit as you think them entitled to receive." In *Emmett v. State*, *supra*, the instruction was that the statement might be believed in preference to the sworn testimony "if you see proper to give it that weight and that place and that importance in the trial of this case." In *Douberry v. State*, 184 Ga. 573, the jury were told they might credit the statement "provided they believe it to be true." In *Allen v. State*, 194 Ga. 430, the charge was: "There is no

presumption attached to the defendant's statement. No presumption that it is true, nor any presumption that it is not true. In other words it goes to you without a presumption either for or against him: You have the right to reject the statement entirely if you do not believe it to be true." In many cases the trial judges have been sustained in specifically pointing out that defendants were not subject to the sanction for perjury with respect to their unsworn statements. "[I]f he failed to tell you the truth, he incurred no penalty by reason of such failure." *Darden v. State*, 171 Ga. 160. "The defendant's statement is not under oath; no penalty is prescribed for making a false statement . . . ." *Klug v. State*, 77 Ga. 734. "Surely there can be no wrong in calling the attention of the jury to circumstances which should impair the force of such testimony or which should enable them to give it the weight to which it is entitled." *Poppell v. State*, 71 Ga. 276. See also *Grimes v. State*, 204 Ga. 854; *Thurmond v. State*, 198 Ga. 410; *Willingham v. State*, 169 Ga. 142; *Millen v. State*, 175 Ga. 283.

Because it is not evidence, the statement is not a foundation supporting the offer of corroborative evidence. *Chapman v. State*, 155 Ga. 393; *Medlin v. State*, 149 Ga. 23. "The statute is silent as to corroborating the mere statement of the accused, and while it allows the jury to believe it in preference to the sworn testimony, it seems to contemplate that the statement shall compete with sworn testimony single-handed, and not that it shall have the advantage of being reinforced by facts which do not weaken the sworn evidence otherwise than by strengthening the statement opposed to it." *Vaughn v. State*, 88 Ga. 731, 736. Similarly the statement is not an independent basis for authenticating and introducing documents. *Sides v. State*, 213 Ga. 482; see also *Register v. State*, 10 Ga. App. 623. In the absence of a specific request, the trial judge need not charge the law applicable

to a defense presented by the statement but not supported in sworn testimony. *Prater v. State*, 160 Ga. 138, 143; *Cofe v. State*, 213 Ga. 22; *Willingham v. State*, 169 Ga. 142; *Holleman v. State*, 171 Ga. 200; *Darby v. State*, 79 Ga. 63. In contrast the trial judge may *sua sponte* instruct the jury to treat the accused's explanation as not presenting a defense in law; "[i]n proper cases the jury may be guarded by a charge from the court against giving the statement an undue effect in favor of the prisoner . . . ." *Underwood v. State*, 88 Ga. 47, 51; *Fry v. State*, 81 Ga. 645.

It is said that an advantage of substance which the defendant may realize from the distinction is that the contents of his statement are not circumscribed by the ordinary exclusionary rules of evidence. *Prater v. State*, 160 Ga. 138, 142-147; *Richardson v. State*, 3 Ga. App. 313; *Birdsong v. State*, 55 Ga. App. 730; *Tiget v. State*, 110 Ga. 244. However, "The prisoner must have some regard to relevancy and the rules of evidence, for it was never intended that in giving his narrative of matters pertaining to his defense he should attempt to get before the jury wholly immaterial facts or attempt to bolster up his unsworn statement by making profert of documents, letters, or the like, which if relevant might be introduced in evidence on proof of their genuineness." *Nero v. State*, 126 Ga. 554, 555. See also *Saunders v. State*, 172 Ga. 770; *Montross v. State*, 72 Ga. 261; *Theis v. State*, 45 Ga. App. 364; *Vincent v. State*, 153 Ga. 278, 293-294.

The situations in which the Georgia cases do assimilate the defendant to an ordinary witness emphasize the anomalous nature of the unsworn statement. If he admits relevant facts in his statement the prosecution is relieved of the necessity of proving them by evidence of its own. "The prisoner's admission in open court, made as a part of his statement on the trial, may be treated by

the jury as direct evidence as to the facts." *Hargroves v. State*, 179 Ga. 722, 725. "It is well settled that the statement of a defendant to a jury is a statement made in *judicio* and is binding on him. Where the defendant makes an admission of a fact in his statement, such admission is direct evidence, and the State need not prove such fact by any other evidence." *Barbour v. State*, 66 Ga. App. 498, 499; *Dumas v. State*, 62 Ga. 58. And admissions in a statement will open the door to introduction of prosecution evidence which might otherwise be inadmissible. *McCoy v. State*, 124 Ga. 218. Admissions in a statement at one trial are admissible against the accused in a later trial. *Cady v. State*, 198 Ga. 99, 110; *Dumas v. State*, *supra*. The prosecution may comment on anything he says in the statement. *Frank v. State*, 141 Ga. 243, 277. Although it has been held that the mere making of a statement does not put the defendant's character in issue, *Doyle v. State*, 77 Ga. 513, it is settled that "A defendant's statement may be contradicted by testimony as to the facts it narrates, and his character may be as effectively put in issue by his statement as by witnesses sworn by him for this purpose." *Jackson v. State*, 204 Ga. 47, 56; *Barnes v. State*, 24 Ga. App. 372. The prosecution may introduce rebuttal evidence of alleged false statements. *Johnson v. State*, 186 Ga. 324; *Camp v. State*, 179 Ga. 292; *Morris v. State*, 177 Ga. 106.

Perhaps any adverse consequences resulting from these anomalous characteristics might be in some measure overcome if the defendant could be assured of the opportunity to try to exculpate himself by an explanation delivered in an organized, complete and coherent way. But the Georgia practice puts obstacles in the way of this. He must deliver a finished and persuasive statement on his first attempt, for he will probably not be permitted to supplement it. Apparently the situation must be most unusual before the exercise by the trial judge of his dis-

cretion to refuse to permit the defendant to make a supplemental statement will be set aside. See *Sharp v. State*, 111 Ga. 176; *Jones v. State*, 12 Ga. App. 133. Even after the State has introduced new evidence to rebut the statement or to supplement its own case, leave to make a supplemental statement has been denied. *Fairfield v. State*, 155 Ga. 660; *Johnson v. State*, 120 Ga. 509; *Knox v. State*, 112 Ga. 373; *Boston v. State*, 95 Ga. 590; *Garmon v. State*, 24 Ga. App. 586. If the subject matter of the supplementary statement originates with counsel and not with the defendant, it has been held that this is sufficient reason to refuse to permit the making of a supplemental statement. *August v. State*, 20 Ga. App. 168. And the defendant who may have a persuasive explanation to give has no effective way of overcoming the possible prejudice from the fact that he may not be subjected to cross-examination without his consent, for he has no right to require cross-examination. *Boyers v. State*, 198 Ga. 838, 844-845. Of course, even in jurisdictions which have granted competence to defendants, the prosecution may decline to cross-examine. But at least the defendants in those jurisdictions have had the advantage of having their explanation elicited through direct examination by counsel. In Georgia, however, as was held in this case, counsel may not examine his client on direct examination except in the discretion of the trial judge. The refusal to allow counsel to ask questions rarely seems to be reversible error. See, e. g., *Corbin v. State*, 212 Ga. 231; *Brown v. State*, 58 Ga. 212. "This discretion is to be sparingly exercised, but its exercise will not be controlled, except in cases of manifest abuse." *Whitley v. State*, 14 Ga. App. 577, 578. Indeed, even where the defendant has been cross-examined on his statement, it has been held that defense counsel has no right to ask a question, *Lindsay v. State*, 138 Ga. 818. Nor may counsel call the attention of the defendant to a material omission in his

statement without permission of the trial court.\* *Echols v. State*, 109 Ga. 508; *Clark v. State*; 43 Ga. App. 384.

This survey of the unsworn-statement practice in Georgia supports the conclusion of a Georgia commentator: "The fact is that when the average defendant is placed in the witness chair and told by his counsel or the court that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful." 7 Ga. B. J. 432, 433 (1945).<sup>18</sup>

<sup>18</sup> For other Georgia comments on the practice, see 17 Ga. B. J. 120; 15 Ga. B. J. 342; 14 Ga. B. J. 362, 366; 3 Mercer L. Rev. 334; cf. 5 Ga. B. J., Feb. 1943, p. 47. The Georgia Bar Association has in the past supported a proposal in the legislature to make defendants competent. See, e. g., 1952 Ga. Bar Assn. Rep. 31. The most recent study of the problem by the Association's Committee on Criminal Law and Procedure resulted in a report recommending against change on grounds that it would "aid the prosecution and conviction of the defendant and would be of no material benefit to any defendant in a criminal case. Those who are on trial for their lives and liberty cannot possibly think and testify as clearly as a disinterested witness, and of course, it is agreed that a shrewd prosecutor could create, by expert cross examination, in the minds of the jury, an unfavorable impression of a defendant." 1957 Ga. Bar Assn. Rep. 182.

Georgia's adherence to the rule of incompetency of criminal defendants contrasts with the undeviating trend away from exclusion of evidence that has characterized the development of the State's law since the nineteenth century. The Code of 1863 indicates that the limitations on and exceptions to disqualifications in the common law were numerous even before the Act of 1866. See, e. g., §§ 3772 (5), 3779, 3780, 3781, 3782, 3783, 3785, 4563. The Georgia Arbitration Act of 1856 had made the parties competent in arbitration proceedings. See *Golden v. Fowler*, 26 Ga. 451, 458. Judge Lumpkin declared: "[A]s jurors have become more capable of exercising their functions intelligently, the Judges both in England and in this country, are struggling constantly to open the door wide as possible to let in all facts calculated to affect the minds of the jury in arriving

The tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of counsel," *Powell v. Alabama, supra*, p. 69, he may fail properly to introduce, or to introduce at all, what may be a perfect defense. "... though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Ibid.*

at a correct conclusion. Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict." *Johnson v. State*, 14 Ga. 55, 61-62.

A policy favoring the reception of evidence has consistently characterized the decisions of the Georgia courts and Acts of the legislature since the 1866 Act. See, e. g., *Blount v. Beall*, 95 Ga. 182; *Myers v. Phillips*, 197 Ga. 536; *Manley v. Combs*, 197 Ga. 768, 781-782; *Sisk v. State*, 182 Ga. 448, 453; *Berry v. Brunson*, 166 Ga. 523, 531-533; *Polk v. State*, 18 Ga. App. 326; *Watkins v. State*, 19 Ga. App. 234. The legislature has removed some of the exceptions retained in the 1866 Act. See Ga. Laws 1935, p. 120, allowing parties to testify in breach-of-promise actions. In 1957 the legislature removed the incompetency of a wife to testify for or against her husband. Ga. Laws 1957, p. 53, § 38-1604. Ga. Code § 38-104 sums up this policy: "The object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence."

Moreover, in the case of defendants jointly tried, Georgia allows one codefendant to testify as a sworn witness for the other, although his testimony may serve to acquit himself if believed. See, e. g., *Staten v. State*, 140 Ga. 110; *Cofer v. State*, 163 Ga. 878. It may even be error in such a situation for the court to treat such testimony as if it were an unsworn statement and to fail to give sufficient emphasis in the charge to the jury as to its effect as evidence. *Staten v. State, supra*; *Burnsed v. State*, 14 Ga. App. 832; *Roberson v. State*, 14 Ga. App. 557; cf. *O'Berry v. State*, 153 Ga. 880. And a defendant is allowed to give sworn testimony as to matters in his trial not going to the issue of his guilt. See *Thomas v. State*, 81 Ga. App. 59.

The treatment accorded the unsworn statement in the Georgia courts increases this peril for the accused. The words of Cooley, J., in his opinion for the Michigan Supreme Court in *Annis v. People*, 13 Mich. 511, 519-520, fit his predicament.

"But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel, and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion be to make, what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed. An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." <sup>19</sup>

We therefore hold that, in effectuating the provisions of § 38-415, Georgia, consistently with the Fourteenth Amendment could not, in the context of § 38-416, deny

<sup>19</sup> There the Michigan Supreme Court reversed a conviction because the trial judge refused to let counsel remind the defendant that he had omitted a material fact from his unsworn statement. The quoted excerpt immediately follows an observation that the Michigan statute permitting an unsworn statement evidently did not contemplate an ordinary direct examination.

appellant the right to have his counsel question him to elicit his statement. We decide no more than this. Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel. For otherwise, in Georgia, "the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U. S. 3, 10.

The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

*Reversed and remanded.*

## APPENDIX.

Ala. Code, 1940, Tit. 15, § 305.

Alaska Comp. Laws Ann., 1949, § 66-13-53.

Ariz. Rev. Stat. Ann., 1956, § 44-2704.

Ark. Stat., 1947, § 43-2016.

Cal. Pen. Code § 1323.5. See also Cal. Pen. Code § 1323;

Cal. Const., Art. I, § 13.

Colo. Rev. Stat. Ann., 1953, § 39-7-15.

Conn. Gen. Stat., 1958, § 54-84.

Del. Code Ann., 1953, Tit. 11, § 3501.

Fla. Stat., 1955, § 918.09.

Hawaii Rev. Laws, 1955, § 22-15.

Idaho Code Ann., 1948, § 19-3003.

Ill. Rev. Stat., 1955, c. 38, § 734.

Ind. Ann. Stat., 1956, § 9-1603.

Iowa Code, 1958, § 781.12. See also Iowa Code § 781.13.

Kan. Gen. Stat. Ann., 1949, § 62-1420.

Ky. Rev. Stat., 1960, § 455.090.

La. Rev. Stat., 1950, § 15.461. See also La. Rev. Stat.  
§ 15.462.

Me. Rev. Stat. Ann., 1954, c. 148, § 22.

Md. Ann. Code, 1957, Art. 35, § 4.

Mass. Gen. Laws, 1932, c. 233, § 20.

Mich. Comp. Laws, 1948, § 617.64.

Minn. Stat., 1953, § 611.11.

Miss. Code Ann., 1942, § 1691.

Mo. Rev. Stat., 1949, § 546.260. See also Mo. Rev. Stat.  
§ 546.270.

Mont. Rev. Codes Ann., 1947, § 94-8803.

Neb. Rev. Stat., 1956, § 29-2011.

Nev. Rev. Stat., 1957, § 175.170. See also Nev. Rev. Stat.  
§ 175.175.

N. H. Rev. Stat. Ann., 1955, § 516.31. See also N. H.  
Rev. Stat. Ann. § 516.32.

N. J. Rev. Stat., 1951, § 2A:81-8.

N. M. Stat. Ann., 1953, § 41-12-19.

N. Y. Code Crim. Proc. § 393.

N. C. Gen. Stat., 1953, § 8-54.

N. D. Rev. Code, 1943, § 29-2111.

Ohio Rev. Code Ann., 1953, § 2945.43.

Okla. Stat., 1951, Tit. 22, § 701.

Ore. Rev. Stat., 1953, § 139.310.

Pa. Stat., 1936, Tit. 19, § 681. See also Pa. Stat., Tit. 19, § 631.

R. I. Gen. Laws Ann., 1956, § 12-17-9.

S. C. Code, 1952, § 26-405.

S. D. Code, 1939, § 34.3633.

Tenn. Code Ann., 1955, § 40-2402. See also Tenn. Code Ann. § 40-2403.

Tex. Code Crim. Proc., 1948, Art. 710.

Utah Code Ann., 1953, § 77-44-5.

Vt. Stat. Ann., 1959, § 13-6601.

Va. Code Ann., 1950, § 19.1-264.

Wash. Rev. Code, 1951, § 10.52.040.

W. Va. Code Ann., 1955, § 5731.

Wis. Stat., 1959, § 325.13.

Wyo. Stat., 1957, § 7-244.

# SUPREME COURT OF THE UNITED STATES

No. 44.—OCTOBER TERM, 1960.

Billy Ferguson, Appellant, | On Appeal From the Su-  
v. | preme Court of the State  
Georgia. | of Georgia.

[March 27, 1961.]

MR. JUSTICE FRANKFURTER'S separate opinion for reversing the conviction, in which MR. JUSTICE CLARK joins.

Georgia in 1784 adopted the common law of England, Act of February 25, 1784, Prince's Digest 570 (1837). This adoption included its rules of competency for witnesses, whereby an accused was precluded from being a witness in his own behalf. It is doubtful whether and to what extent the common-law privilege of an accused, barred as a witness, to address the jury prevailed in Georgia, but it is a fair guess that the practice was far less than uniform. See *Roberts v. State*, 189 Ga. 36, 41. While the common-law rigors of incompetency were alleviated by an enactment of 1866 because "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law," \* Georgia retained the incompetency of an accused to testify in his own defense. In 1868, for the first time a statutory provision granted the accused the privilege of making an unsworn statement to the jury. Ga. Laws 1868, p. 24. The sum of all this legislative history is that the defendant in a criminal prosecution in Georgia was disqualified as a witness, but was given opportunity to say his say to the jury. These two aspects of the legal situation in which Georgia placed the accused were made consecutive sections of the criminal code in 1895, Ga. Code, 1895,

\*Ga. Laws 1866, p. 138.

§§ 1010, 1011, and have thus remained through their present form as §§ 38-415 and 38-416.

(1) It would seem to be impossible, because essentially meaningless as a matter of reason, to consider the constitutional validity of § 38-415 without impliedly incorporating the Georgia law which renders the defendant incompetent to present testimony in his own behalf under oath. This is not a right-to-counsel case. As the Georgia Supreme Court correctly stated: "The constitutional provisions . . . confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure is not a denial of the benefit . . . of counsel." 215 Ga. 117, 119. What is in controversy here is the adequacy of an inextricably unified scheme of Georgia criminal procedure. The right to make an unsworn statement, provided by § 38-415, is an attempt to ameliorate the harsh consequences of the incompetency rule of the section following. Standing alone, § 38-415 raises no constitutional difficulty. Only when considered in the context of the incompetency provision does it take on meaning. If Georgia may constitutionally altogether bar an accused from establishing his innocence as a witness, it goes beyond its constitutional duty if it allows him to make a speech to the jury whether or not aided by counsel. Alternatively, if § 38-416 is unconstitutional—a legal nullity—a Georgia accused can insist on being sworn as a competent witness, and the privilege also to make an unsworn statement without benefit of counsel would constitute an additional benefit of which he may or may not choose to avail himself. If, as is the truth, § 38-415 has meaning only when applied in the context of § 38-416's rule of incompetency, surely we are not so imprisoned by any formal rule governing our reviewing power that we cannot consider the two parts of a disseverable, single whole because petitioner has not

asked us in terms to review both halves. It is formalism run riot to find that the division into two separate sections of what is organically inseparable may not for reviewing purpose be treated as a single, appealable unit. This Court, of course, determines the scope of its reviewing power over a state court judgment.

(2) But if limitations on our power to review prevent us from considering and ruling upon the constitutionality of the application of Georgia's incompetency law—which alone creates the significant constitutional issue—then I should think that what is left of this mutilation should be dismissed for want of a substantial federal question. Considered *in vacuo*, § 38-415 fails, as has been pointed out, to present any reasonable doubts as to its constitutionality, for it provides only an additional right. If appellant had in fact purposefully chosen not to be a witness, had agreed to the validity of the incompetency provisions, and had intentionally limited his attack to § 38-415 as applied, he would be presenting an issue so abstract that the Court would not, I believe, entertain it.

Perhaps the accused failed to offer himself as a witness because he thought it would be a futile endeavor under settled Georgia law, while the opportunity to have the aid of counsel in making an unsworn statement pursuant to § 38-415 would be a discretionary matter for Georgia judges. Since I cannot assume that appellant purposefully intended to waive his constitutional claim concerning his incompetency—though he may not explicitly have asserted this claim—I have no difficulty in moving from the Court's oblique recognition of the relevance to this controversy of § 38-416 to the candid determination that that section is unconstitutional.

# SUPREME COURT OF THE UNITED STATES

No. 44.—OCTOBER TERM, 1960.

Billy Ferguson, Appellant.	On Appeal From the Supreme Court of the State of Georgia.
v.	
Georgia.	

[March 27, 1961.]

MR. JUSTICE CLARK, whom MR. JUSTICE FRANKFURTER joins, concurring.

Because, as applied by the Georgia court, § 38-415 grants criminal defendants the opportunity to make unsworn statements in their own behalf, but withholds from the same defendants the assistance of their counsel in eliciting perhaps more effective statements, the Court today strikes down that section. It is held to be unconstitutional "in the context of § 38-416" which renders criminal defendants incompetent as witnesses at their own trials. The Court does not, however, treat § 38-416 as anything more substantial than "*context*," and, while rendering its validity doubtful, fails to pass upon its constitutionality. The Court's hesitancy to reach that question appears to be due to appellant's tactic, at the trial: of offering his statement under § 38-415 and, in so doing, demanding the aid of his counsel, but not offering himself as a competent witness or challenging his exclusion under § 38-416. This has proven to be a perfect cast of appellant's line, for the Court has risen to the bait exactly as anticipated. The resulting advantage of the Court's present holding to the criminal defendant in Georgia is obvious—as matters now stand, the defendant may make an unsworn statement as articulate and convincing as the aid of counsel can evoke, but the prosecution may not cross-examine.

It is true that merely to defeat such a result is insufficient justification for this Court to reach out and decide

additional constitutional questions otherwise avoidable. Nevertheless, the problem appellant poses under § 38-415 is so historically and conceptually intertwined with the rule of § 38-416 that not only must they be considered together, as the Court expressly recognizes, but they must be allowed to stand or fall together, as a single unitary concept, uncircumscribed by the accident of divisive codification. The section today struck down, § 38-415, is not even intelligible except in terms of the incompetency imposed by § 38-416.\* Were the latter rule not codified, its proscription would have to be understood as § 38-415's operative premise of common law disability. The purported boon of § 38-415 was founded on that disability, against the hardships of which, nowhere else presently imposed, it was intended to at least partially relieve. I would not withhold adjudication because of the fact of codification, nor merely on account of the procedural dodge resorted to by counsel.

Reaching the basic issue of incompetency, as I feel one must, I do not hesitate to state that in my view § 38-416 does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall as surely as does its palliative, § 38-415. Until such time as criminal defendants are granted competency by the legislature, the void created by rejection of the codified common-law rule of Georgia may be filled by state trial judges who would have to recognize, as secured by the Fourteenth Amendment, the right of a criminal defendant to choose between silence and testifying in his own behalf. In the same manner the state courts presently implement other federal rights secured to the accused;

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\*I agree with my Brother FRANKFURTER that if § 38-415 is to be isolated from the incompetency provision of § 38-416, "what is left of this mutilation should be dismissed for want of a substantial federal question."

and therefore the fact that a void of local policy would be created is not an insuperable obstacle to the disposition I propose. Nor would past convictions be automatically rendered subject to fatal constitutional attack unless, as was, in my view, done here, the proper challenge had been preserved by appropriate objection to active operation of the concept embodied in the incompetency rule in either of its phases. In view of the certain fact that criminal prosecutions will continue to be had in Georgia, and that some defendant, if not appellant himself at his new trial, will demand the right to testify in his own behalf, in strict compliance with the procedural standard adhered to today, we will sooner or later have the question of the validity of § 38-416 back on our doorstep. The result, predictably, will be the same as that reached under § 38-415 today. If that proves in fact to be the Court's future disposition of the claim I anticipate, the stability of interim convictions may well be jeopardized where related constitutional claims are preserved but, perhaps, not pressed. So too, on the reverse side of the coin, there may well be interim convictions where, had defendants been permitted to testify under oath in their own behalf, verdicts of acquittal would have been returned. This Court should not allow the administration of criminal justice to be thus frustrated or unreasonably delayed by such a fragmentation of the critical issue through procedural niceties made solely in the hope of avoiding a controlling decision on a question of the first magnitude.

For these reasons I deem it impractical as well as unwise to withhold for a future date a decision by the Court on the constitutionality of § 38-416.

Disagreeing with the distorted way by which the Court reverses the judgment, I join in its reversal only on the grounds stated here and in the opinion of my Brother FRANKFURTER which I join.